



**NEVADA COMMISSION ON ETHICS
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION
REGARDING JUST AND SUFFICIENT CAUSE**

REQUEST FOR OPINION NO. 04-72

SUBJECT: CHIP MAXFIELD, MEMBER
CLARK COUNTY COMMISSION

A. JURISDICTION:

Mr. Maxfield is a public officer as defined by NRS 281.4365. As such, the Commission has jurisdiction over the complaint.

B. REPORT OF INVESTIGATIVE ACTIVITIES:

- Reviewed Request for Opinion 04-72 (see Tab B)
- Reviewed subject's response received October 28, 2004 (see separate book)
- Performed corporate ownership records research and obtained original court documents
- Interviewed Clark County Deputy District Attorney Robert Warhola
- Independently verified date of involvement of Southwest Engineering in the *Fiesta* case (see Tab D)

C. RECOMMENDATIONS:

Based on investigative activities, it is recommended the panel find that sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481(2);
- NRS 281.481(7);
- NRS 281.481(9);
- NRS 281.501(2);
- NRS 281.501(4); and
- NRS 281.505.

SPECIFIC REASONS:

No Allegations or credible evidence of any facts exists that amounts to or supports a violation by any public officer of the above provisions of NRS Chapter 281.

D. SUMMARY OF REQUEST FOR OPINION:

The request for opinion alleges violations of NRS 281.481(2), NRS 281.481(7), NRS 281.481(9), NRS 281.501(2), NRS 281.501(4), and NRS 281.505 by Chip Maxfield, a member of the Clark County Commission.

Mr. Maxfield, as owner of Southwest Engineering, was the design engineer for an apartment complex (Fiesta Apartments). Fiesta Apartments filed suit in July 1999 against Falcon Construction Services for construction and design defects in the project. Eventually, Southwest Engineering was included in the Fiesta suit as a third-party defendant by Falcon Construction. Brett Lovett was retained as an expert witness by Falcon Construction, filed an affidavit detailing the design flaws of Fiesta Apartments, and led a forensic team that challenged the Fiesta contractors and architects.

The complaint asserts Mr. Maxfield, as a party to the *Fiesta* lawsuit, discovered that Mr. Lovett was the expert witness who reviewed and critiqued Mr. Maxfield's engineering plans on behalf of the plaintiff. The complaint asserts that Southwest Engineering, and therefore Mr. Maxfield, stands to incur substantial financial liability in damages as a result of Mr. Lovett's critique of the engineering designs.

Mr. Lovett is also the General Manager of Matrix Construction, Inc. Matrix purchased property located at 7550 West Alexander Road in Las Vegas in hopes of building an office complex. At the time of purchase, Mr. Lovett believed the property was zoned commercial. Subsequent to the close of escrow, he found out the property was, in fact, zoned residential. Thus, Mr. Lovett was required to apply for a zoning variance to re-zone the lot from rural-residential status to commercial status. The application was denied by the Clark County Planning Commission, and subsequently appealed to the Clark County Commission. The Clark County Commission ultimately upheld the denial, with Commissioner Maxfield moving to deny the variance application. The Clark County Commission vote to deny the application was unanimous.

The complaint alleges the Matrix variance application was denied, at least in part, due to Mr. Lovett's participation as an expert witness against Southwest Engineering in the *Fiesta* case. The complaint further alleges because Mr. Lovett and Mr. Maxfield were opposing parties in a lawsuit, where Southwest Engineering had the potential of incurring substantial financial damages, Mr. Maxfield should have disclosed this information to the Commission and should have abstained from voting on the Matrix variance application. (It should be noted for the record that Mr. Lovett and Mr. Maxfield were not opposing parties in a lawsuit; rather, Mr. Lovett was retained as an expert witness for the plaintiff in litigation where Southwest Engineering, a corporation in which Mr. Maxfield is a partner, was later named as a third-party defendant.)

Specifically, the complaint alleges:

- Mr. Maxfield violated NRS 281.481(2) by using his position, then as Chairman, on the Clark County Commission to deny an application for a nonconforming zone boundary amendment relating to 7550 West Alexander Road filed by Brent Lovett at the Clark County Commission meeting held March 7, 2001. It is alleged that by making the motion to deny the application, Mr. Maxfield used his position to gain an unwarranted privilege, preference, exemption, or advantage for himself;
- Mr. Maxfield violated NRS 281.481(7), but fails to provide with specificity the manner in which this statute was violated under the presented facts;
- Mr. Maxfield violated NRS 281.481(9), but fails to provide with specificity the manner in which this statute was violated under the presented facts. However, materials accompanying the complaint specifically say Commissioner Maxfield directed Clark County Deputy District Attorney Robert Warhola to 'wage a litigation war' against Mr. Lovett;
- Mr. Maxfield violated NRS 281.501(2) by failing to abstain from voting on the variance application on March 7, 2001, and by voting on a matter where the independent judgment of a reasonable person in Mr. Maxfield's position would be materially affected because the applicant testified against him in an earlier lawsuit;
- Mr. Maxfield violated NRS 281.501(4) by failing to disclose sufficient information concerning his commitment in a private capacity prior to voting on the variance application; and
- Mr. Maxfield violated NRS 281.505, but fails to provide with specificity the manner in which this statute was violated under the presented facts.

E. SUMMARY OF SUBJECT'S RESPONSE:

In his response, Mr. Maxfield provided the following information:

- The application for a non-conforming zone change requested by Mr. Lovett was sought in order to re-classify an empty lot from a rural-residential classification to a commercial classification so that Mr. Lovett could construct an office complex;
- The application drew widespread opposition and was denied by the Citizens Advisory Counsel;

- On February 8, 2001, the Planning Commission convened and unanimously denied the application;
- On March 7, 2001, the Clark County Commission held a public hearing on the application for variance. It was discovered that Mr. Lovett had already begun construction on the property without the required permits and had been conducting unlicensed commercial activity in violation of zoning. The Clark County Board of Commissioners unanimously denied the zone change application;
- Mr. Maxfield did not know of Mr. Lovett's participation in the lawsuit as an expert witness prior to voting on the zone-change application on March 7, 2001;
- Southwest Engineering was not brought into the lawsuit until August 29, 2001, more than five months after the March 7, 2001 vote on the zone-change application.
- Thus, Mr. Maxfield had no conflict that needed to be disclosed or which required abstention.

F. PERTINENT STATUTES AND REGULATIONS:

NRS 281.481 General requirements; exceptions.

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.

(b) "Unwarranted" means without justification or adequate reason.

7. A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

9. A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

NRS 281.501 Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum; Legislators authorized to file written disclosure.

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be

made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Mr. and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

8. As used in this section, “commitment in a private capacity to the interests of others” means a commitment to a person;
 - a. Who is a member of his household;
 - b. Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
 - c. Who employs him or a member of his household;
 - d. With whom he has a substantial and continuing business relationship;
or
 - e. Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

NRS 281.505 Contracts in which public officer or employee has interest prohibited; exceptions.

1. Except as otherwise provided in this section and NRS 281.555 and 332.800, a public officer or employee shall not bid on or enter into a contract between a governmental agency and any private business in which he has a significant pecuniary interest.

2. A member of any board, commission or similar body who is engaged in the profession, occupation or business regulated by such board or commission, may, in the ordinary course of his business, bid on or enter into a contract with any governmental agency, except the board, commission or body of which he is a member, if he has not taken part in developing the contract plans or specifications and he will not be personally involved in opening, considering or accepting offers.

3. A full- or part-time faculty member or employee of the University and Community College System of Nevada may bid on or enter into a contract with a governmental agency, or may benefit financially or otherwise from a contract between a governmental agency and a private entity, if the contract complies with the policies established by the Board of Regents of the University of Nevada pursuant to NRS 396.255.

4. A public officer or employee, other than an officer or employee described in subsection 2 or 3, may bid on or enter into a contract with a governmental agency if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, he has not taken part in developing the contract plans or specifications and he will not be personally involved in opening, considering or accepting offers. If a public officer who is authorized to bid on or enter into a contract with a governmental agency pursuant to this subsection is a member of the governing body of the agency, the

public officer, pursuant to the requirements of NRS 281.501, shall disclose his interest in the contract and shall not vote on or advocate the approval of the contract.

G. RESULTS OF INVESTIGATION:

Allegations regarding NRS 281.481(2):

In order to find a violation of NRS 281.481(2), all of the following elements must be established:

- (1) that the public officer *used* his position;
- (2) to secure *unwarranted* privileges, preferences, or advantages;
- (3) for himself, any business entity in which he holds a significant pecuniary interest, or any person to whom he has a commitment in a private capacity.

The complaint fails to establish that Mr. Maxfield's participation relating to the zone-change application for 7550 West Alexander Road rose to the level of a violation of statute. The requested zone variance would have allowed Mr. Lovett to build a commercial office complex at the Alexander Road site. While participation in and voting to deny an application for zone change could amount to a public officer *using* his position in violation of the first element of the statute, the real issue lies in the second two elements. It is not clear from the facts that Mr. Maxfield's vote would secure any unwarranted privileges for himself, any business entity, or any other person to whom he has a commitment in a private capacity.

The *Fiesta* lawsuit was not connected in any way to the Matrix zoning request. The only alleged link between Maxfield and Lovett at the Clark County Commission hearing was that Mr. Maxfield's firm, Southwest Engineering, was a third-party defendant in litigation completely unrelated to the agenda item, and Mr. Lovett participated in that litigation on behalf of the plaintiff. The complaint asserts Mr. Maxfield had abstained from participation at Clark County Commission meetings nearly 200 times due to the involvement of his company, Southwest Engineering, in the matters, and thus he knew he had the ability to abstain from voting if presented with a conflict. The complaint assumes the mere link of witness testimony in a trial creates an ethical conflict under statute; however, pursuant to NRS 281.501 disclosure and abstention is triggered by three points:

1. The acceptance of a gift or loan;
2. A pecuniary interest; or
3. A commitment in a private capacity to the interests of others.

In relation to the Matrix zoning request, there is no evidence Mr. Maxfield accepted any gift or loan, had a pecuniary interest, had a commitment in a private capacity directly relating to the variance application. Absent such evidence, there is no conflict which Mr. Maxfield should have disclosed. Further, the complaint does not offer any evidence to support how Mr. Maxfield's vote would act to secure an unwarranted privilege, exemption, preference or advantage for himself. Instead, the complaint appears to allege

Mr. Maxfield's actions were in retaliation against Mr. Lovett for his participation as an expert witness in a lawsuit in which Southwest Engineering was a party. Retaliation is not the subject of NRS 281.481(2), unless such alleged relation would result in an unwarranted privilege, exemption, preference, or advantage. The complaint provides no conclusion as to what unwarranted privilege, exemption, preference, or advantage was actually obtained by Mr. Maxfield, and the investigation did not reveal any evidence that any benefit or advantage was realized. There is no evidence a pecuniary benefit accrued to Mr. Maxfield, either directly or indirectly, as a result of his vote in this matter. Further, the vote to deny the variance application was unanimous; therefore, the vote of Commissioner Maxfield did not appear to affect the final outcome of the variance application.

Mr. Maxfield asserts the timeline relating to the *Fiesta* lawsuit presented within the complaint is not entirely accurate. The complaint asserts that Mr. Maxfield was aware of Mr. Lovett's role in the lawsuit prior to the zone change application vote on March 7, 2001. The complaint suggests Southwest Engineering was brought in as a third-party defendant prior to March 7, 2001, and Mr. Maxfield voted to deny the application because of Mr. Lovett's adversarial role in the lawsuit. Mr. Maxfield states in his response that Southwest Engineering was not brought in as a third party defendant until August 29, 2001, more than five months after the March 7, 2001 vote.

The evidence presented in the subject's response and corroborated by independent investigation of Commission staff confirms the Maxfield version of the timeline. A file-stamped court copy of the third-party complaint obtained independently by Commission staff and also provided by Mr. Maxfield in his response as Exhibit J shows the date of filing as August 29, 2001. No other evidence was found through subsequent investigation that Mr. Maxfield was aware of the lawsuit or Mr. Lovett's involvement prior to March 7, 2001. Thomas Mazeika, Esq. the attorney representing Falcon Construction, the initial defendant and later a third-party plaintiff, stated in a letter that their first contact with Southwest Engineering was through a tender letter dated August 27, 2001 (see Tab D). Mr. Mazeika further claims that Southwest Engineering was served with the third-party complaint on September 17, 2001. Mr. Mazeika did indicate his firm took over this case from the law firm of Thorndal, Armstrong, Delk, Balkenbush, and Eisinger, and that firm might have more information. The Thorndal firm, through Brian Terry, Esq., stated they had no contact with Southwest Engineering while retained as counsel for the *Fiesta* case (also see Tab D). This information is consistent with evidence within the record (see Subject's Exhibit M, affidavit of William Luttrell, Esq.), and affirms both Mr. Maxfield and Southwest Engineering were not aware of the lawsuit at the time he made the motion to deny and subsequently voted to deny the Matrix application.

Therefore, the Executive Director recommends no credible evidence exists to substantiate a potential violation of NRS 281.481(2). Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Maxfield violated the provisions of NRS 281.481(2).

Allegations regarding NRS 281.481(7):

The provisions of NRS 281.481(7) prohibit the use of government time, property, equipment, or other facility to benefit his personal or financial interest. The facts in this case do not implicate any instance where Mr. Maxfield used any county government resources; rather, the complaint addresses primarily disclosure and abstention issues. Thus, NRS 281.481(7) is not applicable to this specific set of facts and circumstances.

Therefore, the Executive Director recommends no credible evidence exists to substantiate a potential violation of NRS 281.481(7). Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Maxfield violated the provisions of NRS 281.481(7).

Allegations regarding NRS 281.481(9):

The complaint alleges Mr. Maxfield retaliated against Mr. Lovett by having Mr. Lovett's property cited seventeen times subsequent to the March 7, 2001 vote. However, materials accompanying the complaint specifically say Commissioner Maxfield directed Clark County Deputy District Attorney Robert Warhola to 'wage a litigation war' against Mr. Lovett, which allegedly included numerous citations of Mr. Lovett's properties by Clark County Code Enforcement Officers.

There is simply no evidence to support such an allegation. The complaint offers copies of two citations imposed on Mr. Lovett's property in support of the allegation. The facts presented suggest there was considerable public opposition to Mr. Lovett's proposed zone change and building plan. According to Mr. Maxfield's response, 110 neighbors appeared at the Lone Mountain Town Advisory Board meeting to protest the zone change (which the Board unanimously recommended for denial to the county planning commission). Further, three petitions with more than five hundred names opposing the change were filed with the county (see Exhibit C of subject's response). This broad opposition suggests the neighbors complained about Mr. Lovett's property on their own accord. Exhibits S and T of Mr. Maxfield's response contain numerous citizen complaints, including request for code enforcement services filed by citizens, with regard to Mr. Lovett's property and the activities thereon.

When interviewed, Deputy District Attorney Warhola stated Mr. Maxfield never asked or directed him to take any actions against Mr. Lovett or any of his properties or business entities. The affidavit of Mr. Warhola also appears to contradict the version of facts and circumstances presented within the complaint (see Tab W of subject's response). Mr. Warhola stated he was merely performing his official duties as a civil district attorney for Clark County, which is consistent with the evidence within the record. Even assuming Mr. Warhola would be considered a 'subordinate' to a county commissioner and such

direction was received from Mr. Maxfield, there is no suggestion Mr. Maxfield would stand to gain personally or through a pecuniary benefit. Mr. Maxfield does not own any neighboring property which could be affected in value. Neither Mr. Maxfield nor Southwest Engineering appear to have any pecuniary interests in relation to the Matrix company, the Park Mountain View Corporation, or the Alexander Road property. As previously mentioned, the complaint appears to allege Mr. Maxfield's actions are in retaliation against Mr. Lovett for his participation as an expert witness in a lawsuit to which Southwest Engineering was a third-party defendant. Even in the context of NRS 281.481(9), the retaliation argument falls flat as the facts support the assumption that Mr. Maxfield was not aware of the *Fiesta* case until at least August 27, 2001 – five months after the Matrix variance application was denied.

Therefore, the Executive Director recommends no credible evidence exists to substantiate a potential violation of NRS 281.481(9). Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Maxfield violated the provisions of NRS 281.481(9).

Allegations regarding NRS 281.501(2) and NRS 281.501(4):

As previously discussed, the *Fiesta* lawsuit was not connected in any way to the Matrix zoning request. The only alleged link between Maxfield and Lovett at the Clark County Commission hearing was that Mr. Maxfield's firm was a third-party defendant in litigation completely unrelated to the agenda item, and Mr. Lovett participated in that litigation as a witness on behalf of the plaintiff. The complaint asserts Mr. Maxfield had abstained from participation at Clark County Commission meetings nearly 200 times due to the involvement of his company, Southwest Engineering, in the matters, and thus he knew he had the ability to abstain from voting if presented with a conflict. The complaint assumes the mere link of witness testimony in a trial creates an ethical conflict under statute; however, pursuant to NRS 281.501 disclosure and abstention is triggered by three points:

1. The acceptance of a gift or loan;
2. A pecuniary interest; or
3. A commitment in a private capacity to the interests of others.

In relation to the Matrix zoning request, there is no evidence Mr. Maxfield accepted any gift or loan, had a pecuniary interest, had a commitment in a private capacity directly relating to the variance application. Absent such evidence, there is no conflict that Mr. Maxfield should have disclosed.

Should the panel disagree with this analysis, the facts offered by the complaint, the subject's response, and the investigation suggest Mr. Maxfield was unaware of both the *Fiesta* lawsuit and Mr. Lovett's role in that lawsuit prior to the March 7, 2001 vote. Southwest Engineering was not brought in as a third party defendant in the civil matter until August 29, 2001. The evidence establishes the earliest date Southwest Engineering

would have known about the lawsuit was on August 27, 2001, by virtue of the tender letter sent by Mr. Mazeika. This date is more than five months after the March 7, 2001 vote to deny the variance. Additionally, Mr. Lovett did not give his official deposition in the *Fiesta* case until July 2, 2002, which is more than a year after the March 7, 2001 date when Mr. Maxfield allegedly knew of Lovett's participation as an expert witness in the case (see Exhibit O of subject's response). Without additional evidence to corroborate Mr. Maxfield did, in fact, know of both the lawsuit and Mr. Lovett's participation in same, there is no apparent conflict as alleged in the complaint. The lack of a conflict renders the statutory disclosure and abstention requirements moot to this set of facts and circumstances.

Therefore, the Executive Director recommends no credible evidence exists to substantiate a potential violation of NRS 281.501(2) or NRS 281.501(4). Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Maxfield violated the provisions of NRS 281.501(2) or NRS 281.501(4).

Allegations regarding NRS 281.505:

The provisions of NRS 281.505 prohibits public officers from bidding on or entering into a contract between a governmental agency and any private business in which he has a significant pecuniary interest. The facts in this case do not implicate any instance where Mr. Maxfield or his company was involved in a contract bid with a governmental agency; rather, the complaint addresses primarily disclosure and abstention issues. There is no evidence of or allegation surrounding such an alleged illegal contract. Thus, NRS 281.505 is not applicable to this specific set of facts and circumstances.

Therefore, the Executive Director recommends no credible evidence exists to substantiate a potential violation of NRS 281.505. Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Maxfield violated the provisions of NRS 281.505.

H. CONCLUSION:

The Executive Director hereby recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion on the allegations that the subject violated NRS 281.481(2), NRS 281.481(7), NRS 281.481(9), NRS 281.501(2), NRS 281.501(4) or NRS 281.505, and further that the allegations be dismissed.

DATED: July 27, 2005

Stacy M. Jennings
STACY M. JENNINGS, MPA
EXECUTIVE DIRECTOR